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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 772

THE NEW YORK TRUST COMPANY, as the Trustee under the Debenture Agreements between it and THE UNITED LIGHT AND POWER COMPANY; MARY A. WALDRON, FREDERICK H. BRUNNER, AMERICAN EQUITABLE ASSURANCE COMPANY OF NEW YORK, KNICKERBOCKER INSURANCE COMPANY OF NEW YORK, NEW YORK FIRE INSURANCE COMPANY, MERCHANTS AND MANUFACTURERS INSURANCE COMPANY OF NEW YORK, and AMERICAN RESERVE INSURANCE COMPANY,

Petitioners,

against

SECURITIES AND EXCHANGE COMMISSION and THE UNITED LIGHT AND POWER COMPANY.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING, WITH ALTERNATIVE MOTION TO DEFER CONSIDERATION THEREOF

BEN LEROY STOWELL,
IRWIN L. TAPPEN,
For Petitioners.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The filing of this petition has been made advisable by the happening of certain important events since the petition for writ of certiorari (No. 772, October Term, 1942) was submitted.

The petition for writ of certiorari questioned, among other things, the power of the Commission to make its order for the retirement of the debentures of The United

Light and Power Company (called Power) in a proceeding for its dissolution under Section 11(b)(2) of the Public Utility Holding Company Act. It was contended that the assumption of that power by the Commission was in contravention of the Constitution, that in the absence of any finding or showing of relationship between the rights represented by the debentures and interstate commerce, the Commission, as an agency of the national government, did not have power to deal with the debentures, and that such action by the Commission had violated valuable contract rights of the debentureholders in contravention of the Fifth and Tenth Amendments of the Constitution (pp. 16, 17). That petition also raised the question whether there should not have been a single, comprehensive plan for the liquidation and dissolution instead of a series of "plans" for successive steps, and it was pointed out how the lack of such a single plan had been detrimental to the debentureholders (pp. 26, 27).

One of the above-mentioned events happening since the petition for writ of certiorari was submitted was a decision by the Commission in this very matter of the dissolution of Power, in which the Commission, in dealing with the rights of the stockholders, announced and followed a rule for determining the participation of security-holders in this matter and in all reorganizations and dissolutions under Section 11 of the Act which is directly contrary to the principle applied by the Commission in dealing with the rights of the debentureholders (S. E. C. Holding Company Act Release 4215, April 6, 1943).

The second event referred to above was the coming on for argument on the calendar of this Court of the case of *The North American Company,* Petitioner, v. *Securities and Exchange Commission,* Respondent (No. 721), on writ of certiorari to the Circuit Court of Appeals for the Second Circuit, which raises questions the decision of which may be determinative of the constitutional questions raised in the petition for writ of certiorari.

The third, and last, event referred to above is the submission of briefs to the United States Circuit Court of

Appeals for the First Circuit in the case of *American Power & Light Company,* Petitioner, v. *Securities and Exchange Commission,* Respondent (No. 3823), in which case the constitutionality of Section 11(b)(2) of the Act is questioned.

The Recent Decision of the Commission

At the time our petition for writ of certiorari was submitted to this Court, the Commission had under advisement a plan (presented by Power pursuant to the dissolution order) for another step in the liquidation proceedings. Under that plan Power's stockholders would share in the distribution of its holdings of common stock in The United Light and Railways Company (Delaware). A few days after the certiorari petition was submitted, the Commission released its opinion on that plan, announcing and applying a rule for determining the participation of security-holders in the matter of the dissolution of Power as well as **in all dissolutions and reorganizations under Section 11 of the Public Utility Holding Company Act** (excerpts from the opinion furnished herewith as an appendix). That rule is the opposite of the rule which was applied in dealing with the rights of the debentureholders.

The rule which has now been announced for determining the participation of security-holders under Section 11 is substantially this: The security-holders affected "should be given participations according to their contractual or other rights determined *as though in a continuing enterprise*" and not "as though in liquidation" and "the measure of participation allowed should compensate for the substantive rights of security-holders as they would exist apart from" the dissolution or reorganization (excerpts, pp. 3, 4) such rights to be "measured not in terms of the situation created by the statute but rather in terms of the situation terminated by it—*i. e.,* as though no liquidation were to take place" (excerpts, p. 8).

That rule is directly contrary to the principle upon which the Commission fixed the participation of the debentureholders. Such participation was not fixed according to the rights of the debentureholders "determined as though in a continuing enterprise". The Commission definitely refused to allow the debentureholders to participate on that basis. It restricted them to a lesser participation deemed by the Commission to have been determined as though in liquidation, not as though in a continuing enterprise (R. 303-305).

In dealing with the debentureholders the Commission was called upon to decide what effect would be given to the contract right of the debentureholders to receive the interest upon their debentures until the specified maturity date—"if the redemption provisions are held inapplicable so that the debentures are treated as being in effect noncallable" (these being the words of the Commission in its opinion on the plan for the retirement of the debentures —R. 313). The Commission refused to give any effect to that contract right to future interest, giving as its reason (R. 313, 314) "that the termination of the investments of debentureholders and stockholders alike has been brought about by the act of a sovereign power—in this case a Congressional mandate" (the statute). Thus the Commission measured the rights of the debentureholders in terms of the situation created by the statute rather than in terms of the situation terminated by it, which is the opposite of the rule recently announced and applied by the Commission in dealing with the stockholders.

In footnote 15 of its Holding Company Act Release 4215 (excerpts, p. 4), the Commission refers to its decision as to these debentureholders and says:

> "Our decision was based on the absence of any provision in the debenture agreements giving the holders a contract right to a premium under the circumstances presented. Thus we were not called upon to decide, and did not consider, what effect would be given to such a contract right if it had existed."

That, however, is only a part of the story. Even assuming that the Commission was not called upon to decide what effect would be given to a contract provision for a redemption premium, still the fact is that the Commission was called upon to decide, and did consider, what effect would be given to the contract right of the debentureholders to receive interest upon their debentures until the specified maturity, and the Commission treated that right "in terms of the situation created by the statute", contrary to the rule now followed by the Commission.

The Circuit Court of Appeals, in reviewing the order for the retirement of the debentures, followed the rule which the Commission had applied. While it recognized the existence of the right of the debentureholders to future interest payments, it held that such payments were excused because "by governmental power * * * the venture has been frustrated" (R. 324). In other words, the court treated the right to future interest payments "in terms of the situation created by the statute" and not according to the rights of the debentureholders "determined as though in a continuing enterprise."

Moreover, in dealing with the participation of the debentureholders, the Commission followed the assumed analogy of a liquidation in bankruptcy (R. 305, 309), whereas in dealing with the participation of the stockholders it said (excerpts, p. 6): "* * * the situation before us is (as we have seen) not comparable to the situation found in bankruptcy."

Furthermore, the rule of participation which was applied to the debentures was not applied to Power's First Lien and Consolidated Mortgage Bonds (Certiorari Petition, p. 26).

The situation created by the Commission's change of position has a special relation to Question 9 presented by the petition for writ of certiorari: "Should there not have been a single, complete plan and a finding by the Commission that such plan was fair and equitable to the persons affected thereby?"

It is hardly conceivable that if there had been a single, comprehensive plan, the Commission would have failed to apply the same rule of participation to all security-holders. The anomalous situation which has arisen here seems to be due largely to the questionable procedure of the Commission in accepting a series of "plans" at intervals instead of requiring a single, comprehensive plan. If such procedure is permitted, the way is opened for unfair and inequitable results.

Thus the order for the retirement of the debentures was made by the Commission, and sustained by the Circuit Court of Appeals, upon a principle which the Commission now holds is not applicable in the proceeding in which the order was made. That alone, we submit, is sufficient reason for granting this petition for rehearing now.

However, if the Court is of the opinion that this petition should not be granted now, the petitioners suggest, and move, that the decision thereon be deferred pending the decisions in *The North American Company* case and the *American Power & Light Company* case referred to herein.

The North American Company Case

As stated above, this case has been reached for argument on the calendar of this Court. Presumably it is about to be argued. The basis of Section 11(b) of the Act is attacked by The North American Company and by *amici curiæ*. If their arguments prevail in this Court, it will mean that the Commission is without authority to direct the liquidation of Power. Although their arguments are directed specifically against Section 11(b)(1), they apply with full force to every provision of Section 11(b), including the clause of Section 11(b)(2) under which the liquidation of Power is proceeding.

In the brief of *amici curiæ*, it is said:

> "The companies we represent contend in the proceedings against them, (1) that Section 11(b) (including Section 11(b)(1) and Section 11(b)(2)) is uncon-

stitutional, in that it does not rest, or even purport to rest, on any federal power, such as the power over interstate commerce, and (2) that Section 11(b) (including Section 11(b)(1) and Section 11(b)(2)) is unconstitutional in that it violates the due process clause of the Fifth Amendment. These are the principal issues on the present appeal, and the abovementioned contentions made in other pending proceedings by the companies we represent will necessarily be affected by the decision in this case."

It is contended in *The North American Company* case that Section 11(b)(1) is invalid for these reasons, among others:

In this subsection there is no plain connection with any Federal power, and Congress made no finding to connect the subsection with any Federal power. The Commission was not directed to make, and did not make, any such finding; and this Court upon inspection of the subsection and related provisions of the Act will see for itself that operation of this statute is plainly not an exercise of the commerce power or any other Federal power, and is not in any way limited in its effect to interstate commerce or matters affecting interstate commerce.

These contentions are similar to certain contentions made in the case at bar and set forth at the beginning of this petition. **The underlying contention is that there is a fundamental lack of power in the national government to enact this statute applying to companies and securities issued by them, irrespective of their being in, or affecting, interstate commerce.**

Is it not highly advisable to keep the case at bar in *statu quo,* so that this Court may readily give relief to these debentureholders if its decision in *The North American Company* case shows that the termination of the debentureholders' investments by the national government was beyond its power?

The American Power & Light Company Case

In this case, now pending in the United States Circuit Court of Appeals for the First Circuit, the brief for the Company has been filed. It appears that the Company is seeking a review of an order of the Commission directing the dissolution of the Company pursuant to Section 11(b)(2) of the Act. It contends, among other things, that the order is a nullity, there being no Federal power to dissolve a corporation of another sovereign (in that case the State of Maine); that the constitutional limitations on Federal power imposed by the due process clause of the Fifth Amendment are violated by Section 11(b)(2); that the subsection does not rest, or purport to rest, on any Federal power such as the power over interstate commerce, and is therefore unconstitutional; and that the subsection is an unconstitutional delegation by Congress of power to the Commission.

It may be that the decision on those questions will be in conflict with the assumption of the Circuit Court of Appeals in the case at bar that there was no merit in similar contentions made by these petitioners. They desire to be in a position to present such conflict, if any, to this Court.

The subject matter of this litigation is a fund equal in amount to the sums which, if the debentureholders prevail, will be payable to them in lieu of future instalments of interest on their debentures. As the fund is held in escrow pending "final determination" of the question whether the debentureholders are entitled to the fund—upon the agreement that if the determination is not favorable to the debentureholders the fund will be turned over to Power—the rights of all persons concerned will be preserved by the holding of the fund in escrow, according to the agreement, pending the final decision of this Court.

WHEREFORE, the petitioners pray this Court for a rehearing of their petition for a writ of certiorari herein, and for the granting of the writ at this time, or, if the Court is of the opinion that the writ should not be granted at this time, then for the deferment of the decision on this petition for rehearing until the handing down of the decision of this Court in the case of The North American Company against the Commission, or until the handing down of the decision of the United States Circuit Court of Appeals in the case of American Power and Light Company against the Commission.

Respectfully submitted,

BEN LEROY STOWELL,
IRWIN L. TAPPEN,
For Petitioners.

May 3, 1943.

As counsel for the petitioners herein, we hereby certify that the foregoing petition is presented in good faith and not for delay.

BEN LEROY STOWELL,
IRWIN L. TAPPEN.

EXCERPTS FROM FINDINGS AND OPINION OF SECURITIES AND EXCHANGE COMMISSION

For Release in the morning newspapers of Tuesday, April 6, 1943

HOLDING COMPANY ACT Release No. 4215

SECURITIES AND EXCHANGE COMMISSION

PHILADELPHIA, PA.

In the Matter of	
THE UNITED LIGHT AND POWER COMPANY THE UNITED LIGHT AND RAILWAYS COMPANY AMERICAN LIGHT & TRACTION COMPANY CONTINENTAL GAS & ELECTRIC CORPORATION UNITED AMERICAN COMPANY, and IOWA-NEBRASKA LIGHT AND POWER COMPANY *Respondents* (File No. 59-17) THE UNITED LIGHT AND POWER COMPANY AND ITS SUBSIDIARY COMPANIES *Respondents* (File No. 59-11) THE UNITED LIGHT AND POWER COMPANY *Applicant* (File No. 54-25) (Public Utility Holding Company Act of 1935)	FINDINGS AND OPINION APPLICATION No. 14

* * * * *

The United Light and Power Company ("Power") and its subsidiary company, The United Light and Railways Company ("Railways"), both registered holding companies, have filed with the Commission joint applications and declarations, designated as "Application No. 14", pursuant to Sections 11(b) and 11(e) of the Public Utility Holding Company Act of 1935 ("the Act") for approval of a plan designed to effectuate the dissolution of Power in compliance with our order of March 20, 1941.[1] In sum-

[1] *The United Light and Power Company*, Holding Company Act Release No. 2636.

mary, the plan provides for the contribution of cash and minor investments of Power to Railways, and the distribution of Power's remaining asset consisting of all the outstanding common stock of Railways among the preferred, Class A and Class B common stockholders of Power, after which Power will be dissolved.

* * * * *

Compliance with Section 11(e) of the Act

As a condition precedent to granting our approval of a plan such as this we are required by Section 11(e) of the Act to find (1) that the plan is necessary to effectuate the provisions of Section 11(b) and (2) that the plan is fair and equitable to the persons affected by it.

Necessity for the Plan

We encounter no difficulty in making the first of these required findings. The plan provides for the liquidation and dissolution of Power, which we have previously found necessary under Section 11(b) (2) of the Act, and dissolution is to be preceded by the elimination of Power's stock liability through a distribution of assets in kind, a method we believe to be both economical and appropriate to effecting compliance with the standards of Section 11(b) of the Act.

Fairness and Equitableness of the Plan

The second required finding, namely, that the plan is "fair and equitable to the persons affected by such plan," presents a more difficult problem. The assets of Power are, in our opinion, of insufficient value to satisfy the stated liquidation preference of the preferred stock in the amount of $100 per share for 600,000 shares, plus arrearages of $38,700,000, or a total of $98,700,000, as of December 31, 1942.

* * * * *

If the amount of the liquidation preference of the preferred stock ($100 per share plus accumulated dividends) is controlling, our inquiry must perforce be ended at this point in a decision that the preferred stock is entitled to all the assets of the corporation to the exclusion of the common. Power's corporate charter provides that the liquidation preference of this stock shall come into operation in the event of "involuntary" liquidation. While the liquidation in this case is doubtless "involuntary," it is of a type that could not have been foreseen by the draftsmen of the corporate charter or by investors in the stock, long before the enactment of the Holding Company Act.[12] The question, then, is whether or not it would be "fair and equitable", in light of the legislative purpose and policy underlying Section 11 of the Act, to give controlling effect to that charter provision under the circumstances.

We have found no judicial precedents which are determinative of the precise question before us. Decisions like those in the *Los Angeles Lumber*[13] and *Boyd*[14] cases are predicated on sets of facts fundamentally distinguishable from the situation arising here. In bankruptcy or equity reorganizations, where some financial disaster overtakes or theatens to overtake an enterprise, the courts and Congress have proceeded on the theory that it is often in the interest of creditors and other claimants that the enterprise be permitted to continue in operation, but with a new capital structure. Creditors and other claimants are prevented from foreclosing or otherwise compelling an actual liquidation, but new securities are distributed among them according to their contractual and other rights determined *as though in liquidation.* The historical background of this approach is so familiar as to need no elaboration here.

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12 The preferred stock was created in 1929, six years prior to the passage of the Act. We think that involuntary liquidation, in the context in which that term is used in the corporate charter, connotes an act of default, either financially or in respect of conduct, on the part of the corporate management representing the common stock. In short, it contemplates protection of the preferred stock from business risks such as ordinarily attend equity investment. We do not, however, rest our decision upon this interpretation, as will be more fully developed, *infra,* but only point out that the draftsmen of the charter could not have had Section 11 of the Act in mind.

13 *Case* v. *Los Angeles Lumber Products Co.,* 308 U. S. 106.

14 *Northern Pacific Railway Co.* v. *Boyd,* 228 U. S. 482.

On the other hand, Power is a company virtually without debt and under no financial embarrassment in the traditional bankruptcy or equity sense. Since it falls into a category of holding companies which Congress has determined must *not* be permitted to continue in operation, in the interests of the public, investors and consumers, the company's security holders are prevented from maintaining their respective interests in a going corporation. In our view, it is not inconsistent with the bankruptcy and equity precedents to conclude that in reorganizations or liquidations to comply with Section 11, stockholders affected should be given participations according to their contractual or other rights determined *as though in a continuing enterprise,* and that the process of compliance with the statute should not be permitted to mature liquidation preferences. In both instances the measure of participation allowed should compensate for the substantive rights of security holders as they would exist apart from the reorganization or other procedure in question.

In the case before us, the duty to liquidate arises solely by virtue of a sovereign act, and in giving effect to the Congressional mandate we must not allow the liquidation itself to add value to one class of securities at the expense of another class.[15]

Where simplification of a system is to be attained through elimination of an unnecessary corporate entity, it is our opinion that the "fair and equitable" standard does not require us to consider liquidation rights as having matured, and as the sole measure of participation for the preferred stockholders; and it should be immaterial whether the simplification process takes the form of recapitalization, merger or distribution of the assets of a holding company in liquidation. In other words, the

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[15] Cf. *The United Light and Power Company,* S. E. C. (1942), Holding Company Act Release No. 3345 (aff'd *The New York Trust Co.* v. *S. E. C.*, 131 F. (2d) 274 (C. C. A. 2d, November 12, 1942), in which we applied this reasoning to the liquidation of Power's debentures at par and accrued interest without premium. Our decision was based on the absence of any provision in the debenture agreements giving the holders a contract right to a premium under the circumstances presented. Thus we were not called upon to decide, and did not consider, what effect would be given to such a contract right if it had existed.

"fair and equitable" standard requires the same recognition of substantive rights irrespective of the method employed in a particular case for attaining the objectives of Section 11(b)(2).

More specifically, if a class of preferred stock has a measurable interest in an enterprise absent the maturing of liquidation preferences and a proportionately greater interest upon the maturity thereof, it would not be fair or equitable under the statute to give recognition to the greater interest at the expense and to the detriment of the common stock. And conversely, if the common stock has a measurable interest apart from the maturing of liquidation preferences, we must not sanction the destruction of that interest through the operation of the statutory mandate.[15a]

Clearly the intent of Congress was that the techniques employed under Section 11 should be those necessary to remove the holding-companies' concentration of economic power over operating utilities, promote local management and regulation for the benefit of consumers, eliminate unnecessary and uneconomic corporate entities, and benefit investors generally by giving them more direct interests in the operating properties and earnings *to the extent that their holding-company securities represent any real equity therein.*[16] The liquidation of Power accomplishes an im-

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[15a] This conclusion seems to us in no way inconsistent with the Commission's position as to the right of bondholders to a premium on liquidation, nor with the implications of the various cases arising under the Anti-Trust Acts which are referred to in the dissenting opinion. Interpretation of contract provisions is of course a necessary starting point for evaluating interests. There remains the question of what may be fair and equitable in the light of the entire bundle of contractual rights.

[16] That this process was not to operate so as to destroy values was emphasized repeatedly. For example, in reviewing the integration and simplification provisions of the Senate bill, the report of the Committee on Interstate Commerce points out that one means of compliance would be for holding companies: "to distribute their securities and assets equitably among their security holders. Precedents under the Sherman Antitrust Act and under the Hepburn Act demonstrate that the necessary corporate adjustments can be made without forced liquidation or the sacrifice of legitimate investment values." Sen. Rep. No. 621 (74th Cong. 1st Sess.) at page 33. It is clear from the context that "forced liquidation" as used by the Committee meant forced sales.

Congressman Eicher (later Chairman of this Commission and now Chief Justice of the District Court of the United States for the District of

portant step in this direction by giving the preferred and common stockholders a security that is better than those they have heretofore held. This process of improvement of position must not be permitted to destroy any legitimate interests of the common stock, or present a windfall to any senior security. Where such an inequitable result would be reached by borrowing bankruptcy techniques for assessing the claims involved, we must reject bankruptcy techniques as inappropriate under the circumstances; and we think it logical enough that they should be inappropriate here, since the situation before us is (as we have seen) not comparable to the situation found in bankruptcy.[17]

It is pointed out in Commissioner Healy's separate opinion that the words "fair and equitable" embodied in Section 11 have a settled meaning, as determined by the courts, and that an application of the "absolute priorities"

Columbia), discussing the same bill (S. 2796), expressed his views and the views of other members of the House Committee in these terms:

> "But Section 11 of the Senate bill would give fair assurance that what is left of the investor's equity would not hereafter be taken from him and it would give fair assurance that any legitimate increase in value of the underlying properties would go to investors * * *
>
> "There is nothing in Section 11 of the Senate bill which will hurt any legitimate investment interest. It does strike and strike hard at that dangerous concentration of economic power which resides in the holding company." H. Rep. No. 1318 (74th Cong. 1st Sess.) at page 51.

In so far as pertinent to this question, the purposes of Section 11 in the final enactment coincided with those of the Senate Bill. See H. Rep. No. 1903 (74th Cong. 1st Sess.) at pages 65, 68-71.

17 Indeed, the legislative history of the Act appears to recognize the inapplicability of precedents in bankruptcy. See the statement of the Senate Committee, footnote 16, *supra*.

Earlier in the same report the Committee spoke of the courts exercising "all the extraordinary powers such courts have been accustomed to exercise when called upon under the Sherman and Hepburn Acts to effect compulsory corporate readjustments required by the public policy expressed in those acts." Id., at page 13.

And further:

> "* * * The process of compulsory divestment of control is left to the Federal courts, without time limit, for the applications of the technique worked out in the dissolution under the Sherman Act and the Hepburn Act (commodities clause).
>
> "The title provides that during all court processes the Securities and Exchange Commission shall act as an impartial expert economic adviser and administrative assistant to the courts. That expert assistance will enable the courts to save time and expense in the solution of essentially economic and administrative problems for which in the Sherman Act cases it had no assistance except that of opposing counsel. But the courts can take such time as they deem advisable to dispose of assets without sacrifice." Id., at page 14.

doctrine must result in no distribution to Power's common stock in this case. But that is because he measures the rights of the preferred stock as they would be measured in bankruptcy cases, and not merely because he follows the "absolute priorities" doctrine in determining the consequences of the measurement. In other words, we can agree with him when he says that absolute priorities must be respected, because we think that doctrine simply means that the common stock must not be accorded any participation unless the preferred stock has been fully compensated for its rights and priorities. But there the area of agreement stops, because he says further that the rights and priorities of the preferred stockholders are the same here as in bankruptcy cases, where their claims to liquidation preferences (including dividend arrearages) are treated as matured. In our view it would be unconscionable and contrary to the plain intention of Congress to so hold.

It is our conclusion that we must judge the fairness of the plan according to legitimate investment values existing apart from the duty of liquidation imposed by the statute. The existence of the liquidation preference does, of course, enter into the question as it is one of the bundle of rights belonging to the preferred stock and affecting its normal value. The preference itself, however, will not be permitted to operate so as to be conclusive in the division of assets between the preferred and common stocks.[18]

By the foregoing we do not imply that compensation should or can be given in eliminating any "rights" which are proscribed by the statute as being unfair, such as the naked "right" to exercise a voting power which is inequitable under the statutory standards, or the "right", by misuse of power, to delay or prevent compliance with the statute. The "legitimate investment value" to be accorded

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18 This is the first instance in which we have been called upon to decide this precise question. To the extent that our conclusion is at variance with *dicta* in previous cases, such *dicta* are overruled.

For example in *Federal Water Service Corp., et al.,* 8 S. E. C. 893 (1941), we intimated that in a liquidation required under Section 11(b)(2) the rules applicable to a bankruptcy reorganization proceeding would be applicable (p. 910). That case did not involve liquidation of any kind, and the language referred to was not necessary to the decision.

recognition may include those rights and expectancies which, although possibly predicated on an unsound or economically undesirable structure, are not inherently unfair. An example is the interest of the common stock in net income over and above fixed amounts applicable to senior securities—where there is a reasonable chance of such income. Although it is repugnant to the policies of the Act to have the corporation continue in operation, the common stockholders' interest in the earnings of Power's assets is not for that reason proscribed. The limitation of the preferred stock dividend to a fixed amount is a valuable right vested in the common stock; and the value of such right, in light of the earning capacity of Power's assets, may be recognizable even though it would take a number of years, in the absence of liquidation, for dividends to be payable to the common stock. The accumulation of preferred dividend arrearages does not constitute a matured claim in the absence of liquidation, and does not require compensation to the preferred stockholder for the lapse of time which may precede payment.

* * * * *

To accelerate the arrearages and translate them into matured claims at their full face amount, so as to entitle the preferred stock not only to all the assets but also in perpetuity to the entire earning power of those assets—a portion of which would otherwise have been applicable to the common stock—would clearly be to enrich the preferred at the expense of the common.

Under the circumstances, fair and equitable compensation will be given to all of the claimants if their rights are measured not in terms of the situation created by the statute but rather in terms of the situation terminated by it—*i. e.*, as though no liquidation were to take place. In this way each class of stock will be accorded its proportionate share of the benefits to be gained from the elimination of a useless and expensive corporate entity and from the receipt of a security representing a more direct investment in the underlying assets and earnings of the system.

* * * * *

End